typically has consisted of the record of proceedings before the Combatant Status Review Tribunal that confirmed petitioner's status as an enemy combatant properly subject to detention." When it filed that brief, the Executive already had determined that the Petitioners were not enemy combatants. Pet. App. 1a-2a.

By this point, the Petitioners had passed the fourth anniversary of imprisonment by United States forces (in Kandahar and Guantánamo). Pet. App. 4a. They were permitted no visitors, no contact with the outside world, no newspapers or news magazines. They had no word from their wives, parents, or children.

Misled as to Petitioners' combatant status, the district court granted the Executive's stay motion in May, 2005. Pet. App. 2a. That same month, each Petitioner was advised in Guantánamo that he had been determined not to be an enemy combatant. *Id.* at 1a-2a. No one told counsel or the district court, however, and Petitioners were unable to contact anyone. *Id.* at 2a.[3]

On July 13 and 14, 2005, counsel first met Petitioners in separate meetings in small isolation cells at Guantánamo Bay, where Petitioners were chained to the floor. In these meetings, counsel for the first time learned of the noncombatant findings. Pet. App. 2a-3a. On return from the base, Petitioners' counsel filed an Emergency Motion to Vacate Stay Order and Issue Writ Directing Immediate Release of Petitioners, and the Court scheduled an August 1, 2005 hearing. *Id.* at 3a. In a brief filed July 29, 2005, the Executive for the first time admitted that

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[3] Counsel were not admitted to the base until screened by the FBI, although they repeatedly requested access to the Petitioners. In May, 2005, Petitioners wrote letters advising that they were "innocent," but those letters were not delivered to counsel until September, 2005.

Petitioners were not enemy combatants, and that CSRT proceedings had concluded on March 26. 2005.[4]

In mid-August of 2005, Petitioners, along with other prisoners found to be noncombatants, were hastily moved to "Camp Iguana," a slightly lower-security prison. Ten or fewer men have been imprisoned there ever since. The isolation is intense. "We are completely cut off from the outside world. If we continue to be held here, it is going to drive us all crazy," said Petitioner Qassim in November, 2005.

The Executive advised the district court that the men continued to be held because they could not be returned to Communist China, where they would be subject to torture. The district court was assured, both on the record and in chambers, that the Executive was attempting to arrange a resettlement of the men. In August, 2005, the court advised that it would permit the Executive some time to attempt to resolve the matter diplomatically. Pet. App. 3a.

No resettlement was arranged. In an effort to assist with this process, Petitioners moved for access to representatives of the United Nations High Commission for Human Rights ("UNHCR"). The motion was strenuously opposed and ultimately denied in December of 2005.

Petitioners urged the district court to order one of three remedies: (i) release of the men into the civilian population of Guantánamo Bay; (ii) under the doctrine of *Baker v. Sard*, discussed *infra*, production of the body of each Petitioner in court, for the district court then to order a parole of each

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[4] "Completion" of a CSRT happens long after the hearing, as it involves multiple levels of administrative review within the Department of Defense. *See generally* Wolfowitz Order.

Petitioner pursuant to conditions of release pending an ultimate resettlement by the Executive; or (iii) outright release.

On December 22, 2005, the district court denied the *habeas* petition, ruling correctly that the Executive's imprisonment of the Petitioners is unlawful, and incorrectly that the judicial branch is powerless to fashion a remedy against the lawless conduct of the Executive. Pet. App. 1a-12a.

E. Proceedings on Appeal

On December 23, 2005, Petitioners filed their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. The appeal was docketed on December 28, 2005. Accordingly, the case is "in the court[] of appeals" within the meaning of 28 U.S.C. § 1254. *See* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 2.4, at 75 (8th ed. 2002).[5]

REASONS FOR GRANTING THE PETITION

A federal court has ruled itself impotent to remedy imprisonment by the Executive in a case within its jurisdiction. The import and impact of this ruling are systemic and profound. Central to the design of the Constitution is the equipoise between

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[5] On January 12, 2006, Petitioners filed a motion to expedite the proceedings and resolution of the appeal. That motion does not obviate the need for this Court's intervention before judgment by the court of appeals. As discussed *infra*, the pure questions of law at issue here go to the core of the judicial power and of the obligations of the coordinate branches, and are of such profound importance as to require immediate review by this Court. Moreover, expedition by the court of appeals, even if granted, likely would not result in the swift resolution so urgently needed in this case. Indeed, although expedition was granted by the court of appeals in *Al Odah, Khaled A.F., et al. v. United States, et al.*, D.C. Circuit No. 05-5064, the appeal remains unresolved nearly a year after it was docketed.

a powerful executive branch and a judiciary able to check overreaching in discrete cases. That balance confers on the judicial branch not only the power, but the duty to remedy discrete instances of Executive lawlessness where, as here, they occur within its jurisdiction.

The district court's ruling that a *habeas* court may determine that a petitioner's imprisonment by the Executive is illegal but that it nonetheless has "no relief to offer" ignores the imperative of remedy in *habeas* cases -- particularly cases of imprisonment by the Executive -- and drains all meaning from this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004). The district court's failure to grant a remedy in this case is an abdication of its judicial function under 28 U.S.C. § 2243 and the Constitution. Its practical effect is to eliminate meaningful judicial review and to eviscerate one of the key checks on the Executive power built into the constitutional plan.

Liberty can never be secure when the judicial branch declares its impotence. Accordingly, the damage to the public is profound. The damage to the relations of the United States with foreign persons and nations is equally profound, for the ruling proclaims an Executive with unchecked power to seize innocents from around the globe, transport them to United States territory, and imprison them at its pleasure.

Because this petition poses the question of judicial duty under 28 U.S.C. § 2243 and the Constitution in its most grave and urgent context, certiorari should be granted *before* entry of judgment by the court of appeals. The legal issues are straightforward; the significance to the judicial and executive branches acute; and the normal appellate process would extend to absurdity a four-year imprisonment already adjudicated unlawful. This is that rare case in which the Court's immediate intervention is merited.

A. Certiorari Should Be Granted To Remedy the District Court's Intolerable Abdication of its Function under 28 U.S.C. § 2243 and the Constitution.

28 U.S.C. § 2243 mandates that the *habeas* court "dispose of the matter as law and justice require."[6] The district court correctly identified and posed the decisive issue presented by this record: "The question in this case is whether the law gives . . [a federal court] the power to do what . . . [it] believe[s] justice requires. The answer . . . is no." Pet. App. 6a.

The district court's conclusion that justice requires the Petitioners' release is manifestly correct. These men have now been imprisoned *seven times longer* than the presumptive maximum period of reasonable confinement recognized in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 125 S. Ct. 716 (2005), with no end in sight. Pet. App. 6a. The only distinctions between Petitioners' case and that of the unadmitted foreign nationals in *Martinez* are that (1) the foreign nationals in *Martinez* each had been convicted of serious crimes in the United States, whereas Petitioners have never even been

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[6] The relevant facts occurred, and the action below was brought, prosecuted, and decided prior to the enactment by Congress of The Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X of the Defense Appropriation Act, H.R. 2863, 109th Cong., 1st Sess. (the "Act"). The Act was signed into law by the President on December 30, 2005. Petitioners believe that the Act has no application to pending Guantánamo cases, including this case. *See Hamdan v. Rumsfeld*, No. 05-184, Brief Amici Curiae of More than 300 Detainees Incarcerated at U.S. Naval Station, Guantánamo Bay, Cuba, and their Family Members, in Support of Petitioner and in Support of Jurisdiction (filed January 6, 2006). Petitioners believe that, given the circumstances of this case, there are other reasons (in addition to those discussed in the cited amicus brief) why the Act does not apply here. Petitioners request the opportunity to brief this issue, should the Court deem it to be necessary to its decision whether to grant this petition.

charged with one; and (2) the foreign nationals in *Martinez* bore responsibility for their stateless plight, because they chose to come to the United States voluntarily, whereas Petitioners were transported involuntarily to Guantánamo by bounty hunters and the United States military.

The district court concluded that it was divested of the power to do what justice manifestly requires by an unspecified emanation from "the separation of powers doctrine." Pet. 7a-11a. Nowhere does the court cite any authority that such an emanation exists, and *Martinez* makes clear that it does not.

In *Martinez*, which involved Cubans who arrived in the United States as part of the Mariel boatlift, this Court approved release into the population of *aliens who had never been admitted to the United States*. Under the law then effective, such refugees were not lawful aliens, and they were not "admitted," but rather "paroled" into the United States.[7] (Refugees could later adjust their status to that of lawful permanent resident unless they fell within statutory exclusions.) The *Martinez* petitioners committed serious crimes in the United States, and were therefore excluded from admission. They were thus unlawful aliens who had never been admitted to the United States. The men were ordered deported, but because Cuba would not accept them, they were detained pursuant to statute. They brought *habeas corpus* petitions, and this Court ordered that they must be released, even though they had never been lawful resident aliens. *Martinez*, 543 U.S. at 727; *see also Zadvydas*, 533 U.S. at 699-700 (adjudicated criminal aliens entitled to release).

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[7] The Attorney General has discretion to "parole" into the territory of the United States an alien who has never been admitted. 8 C.F.R. § 212.5(a) (2004).

In sum, there is no "law" or "separation of powers" issue pursuant to which the judicial branch may withhold what it correctly determined "justice" requires: an end, after more than four years, of wrongful imprisonment, even if the only means of facilitating that end is parole into the continental United States pending a diplomatic resettlement abroad.

No one disputes that a *habeas* court has inherent power to order "parole" -- that is, release on conditions -- a power included within *habeas* jurisdiction itself. *See Mapp v. Reno*, 241 F. 3d 221, 226 (2d Cir. 2001) (parole for alien); *Baker v. Sard*, 420 F.2d 1342, 1343 (D.C. Cir. 1969) ("When an action pending in a United States court seeks release from what is claimed to be illegal detention, the court's jurisdiction to order release as a final disposition of the action *includes an inherent power* to grant relief *pendente lite*, to grant bail or release, pending determination of the merits.") (emphasis supplied); *Whitfield v. Hanges*, 222 F. 745, 756 (8th Cir. 1915) ("the court has ample power to admit the alien to bail or to take his own recognizance").[8] In the district court, the Petitioners requested that the court order the Executive to produce the bodies under 28 U.S.C. § 2243 and in court consider reasonable conditions for parole. There is no lawful reason why this remedy should not have been afforded upon the filing of the petition in March, 2005.

The federal judiciary "historically has been thought necessary to provide an important safeguard against abuses of legislative and executive power, as well as to ensure an independent judiciary." *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 66 (1992). When the Executive has acted

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[8] *See Chick Yow v. United States*, 208 U.S. 8, 13 (1908) (ordering writ of *habeas corpus* for a petitioner denied entry in a case in which citizenship was disputed; prisoner ordered brought before judge for trial).

illegally -- i.e., beyond the scope of its constitutional powers, as has been adjudicated to be the case here -- it is the constitutional duty of the judiciary to order the Executive to stop and the duty of the Executive to obey the judicial order. *See United States v. Nixon*, 418 U.S. 683, 703-05 (1974). The district court simply abdicated that duty. There is no balance without a check, and the effect of this abdication is to throw the constitutional design into imbalance.

Judicial recognition of the duty of the Executive to comply with court orders in *habeas* cases dates at least to the Civil War period. *Ex parte Merryman*, 17 F. Cas. 144, 9 Am. Law Reg. 524 (C.C. Md. 1861). There, the Chief Justice, finding an imprisonment unlawful, ordered the President to end it, and further, to fulfill his constitutional obligation to execute the laws faithfully. *See* 17 F. Cas. at 148-153 (explaining that the President has the "duty to come in aid of the judicial authority" and that, in exercising the power of the office, "he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments"; that "[t]he government of the United States is one of delegated and limited powers; it derives it existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted"; and ordering the President, "in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced").

Correcting a "fundamentally unjust incarceration" is a judicial "imperative." *Murray v. Carrier*, 477 U.S. 478 (1986). *See also Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Schlup v. Delo*, 513 U.S. 298 (1995). Nowhere is this imperative more urgent than in cases in which courts review the legality of imprisonment by the Executive. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004); *Martinez*, 543 U.S. at 727; *Rasul*, 542 U.S. at 474; *Zadvydas*, 533 U.S. at 699-700; *INS v. St. Cyr*, 533 U.S.

289, 301 (2001); *see generally Harris v. Nelson*, 394 U.S. 286, 292 (1969) ("There is no higher duty of a court under our constitutional system than the careful processing and adjudication of petitions for writs of *habeas corpus*."); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939) ("It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.").

The district court's premise that it could not bring the Petitioners into the continental United States was rejected in *Rasul*, in which this Court concluded that Guantánamo petitioners are *already* within the "territorial jurisdiction" of the United States. *See* 542 U.S. at 480-81 (finding that the United States "exercises complete jurisdiction and control" over the Guantánamo Bay Naval Base"). When this Court concluded that the district court had jurisdiction of Guantánamo *habeas* cases, and that the petitioners were in a "place that belongs to the United States," it did not mean that a court that granted relief would be bringing Guantánamo petitioners to the United States. The Secretary of Defense did that years ago.

This Court recognized long ago that it is "a monstrous absurdity in a well organized government that there should be no remedy, although a clear and undeniable right shou be shown to exist." *Kendall v. United States*, 12 U.S. (Pet.) 524, 624 (1838); *see* 3 W. Blackstone, COMMENTARIES 23 (1783) ("[W]here there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."). Certiorari should be granted to review the district court's contrary decision in this case.

B. Certiorari Before Judgment Is Warranted in the Extraordinary Circumstances of this Case.

Certiorari before judgment is rarely granted, and "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice

and to require immediate determination in this Court." SUP. CT. R. 11. It has most commonly been permitted where a case of public moment presents a square conflict between core functions of two branches of government. *E.g.*, *United States v. Nixon*, 417 U.S. 927 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952); *Ex Parte Quirin*, 317 U.S. 1 (1942). It has also been granted in cases involving a significant question concerning the relations of the United States to other nations, *see Dames & Moore v. Regan*, 453 U.S. 654, 667-68 (1981); *Wilson v. Girard*, 354 U.S. 524, 526 (1957); *The Three Friends*, 166 U.S. 1, 5 (1897), and where questions concerning the war powers of the Executive are involved, *see Reid v. Covert*, 351 U.S. 487, 488 (1956); *Kinsella v. Kruger*, 351 U.S. 470, 473 (1956); *Youngstown*; *Quirin*; *The Three Friends*. This case fits the unusual mold of cases in which the Court has granted certiorari before judgment.

This Court's intervention is called for to address an urgent, systemic need. In 2004, concerned about indefinite detention that could stretch "from months to years," *see Rasul*, 542 U.S. at 488 (Kennedy, J., concurring in the judgment), this Court, using the plainest possible words, directed that the district courts should "consider in the first instance the merits" of the Guantánamo cases, mandating that cases with merit should be identified, facts determined, remedies ordered, and issues sharpened for any further appellate review necessary. 542 U.S. at 485. *Rasul* held "that section 2241 confers on the district court jurisdiction to *hear* petitioners' habeas corpus *challenges* to the legality of their detention." *Id.* at 484 (emphasis supplied). A hearing on a *petitioner's* challenge means a hearing on facts and law, not a mere test of pleadings under Rule 12(b) of the Federal Rules of Civil Procedure (which would be the Executive's challenge, not a petitioner's). That the Court had in mind such a contest is plain in the text, but lest there should be confusion, the Court added a note. *Id.* at 483 n.15. The Court then directed "the District Court to consider in the first instance the merits of the claims." *Id.* at 485.

Executive obstructionism and (Petitioners regret to say) the acquiescence of the lower courts resulted in disobedience of that mandate. Following a renewed government motion to dismiss the first-filed Guantánamo cases, all of the *habeas* cases were stayed from and after February, 2005, with the result that *not a single Guantánamo habeas case was considered on the merits until this one, in December, 2005*. The record of delay and resistance in the Guantánamo cases, including this one, threatens to mock the judiciary itself, raising the "monstrous absurdity" of right without remedy, *Kendall*, 12 U.S. (Pet.) at 624; ignoring the "imperative of correcting a fundamentally unjust incarceration," *Engle*, 456 U.S. at 135; and allowing the Executive to wield power unchecked, in contravention of the Constitution.

The Court has taken the unusual step of granting certiorari before judgment in cases that demonstrate a systemic fault line in the justice system itself, and when the Court needs to protect the institutional authority of the judiciary. *See United States v. Fanfan*, 542 U.S. 956 (2004); *Mistretta v. United States*, 488 U.S. 361, 370-71 (1989); James Lindgren & William P. Marshall, THE SUPREME COURT'S EXTRAORDINARY POWER TO GRANT CERTIORARI BEFORE JUDGMENT IN THE COURT OF APPEALS, 1986 S. Ct. Rev. 259, 287-88, 294-95 (1986).

No legal issue in this case will benefit from consideration by the court of appeals. The ruling that the Petitioners' imprisonment is illegal is plainly correct. The district court correctly analyzed and rightly rejected the Executive's vague claim of a limitless power to seize aliens in places far from battlefields, transport them across the globe, and imprison them at its pleasure. The Executive cited no authority in support of its claim, and there is none. *See* Pet. App. 4a-6a.

Certiorari before judgment is also appropriate because of the impact of the district court's ruling on the foreign affairs of the United States. In ignoring this Court's directive in *Rasul*, and abdicating its judicial function, the district court's decision

once again renders Guantánamo Bay a place and a prison beyond law. Because the Executive asserts the power to seize persons -- such as these very Petitioners -- in sovereign nations like Pakistan and hold them indefinitely at Guantánamo, the district court's ruling is a proclamation to the world that our Executive has set up a lawless reserve. This can only damage the foreign relations and prestige of the United States.[9] A prompt decision that there is indeed a remedy for lawlessness would have the opposite and salutary effect.

Similar circumstances led to the first grant of certiorari before judgment, during the Cuban Revolution that preceded the Spanish-American war. In *The Three Friends*, the Executive arrested a ship under a federal law that prohibited outfitting a vessel for a "foreign colony, district, or people," to wit, Cuban revolutionaries. 166 U.S. at 58. The owners successfully argued to the district court that Cuban revolutionaries were not a "foreign colony, district, or people," despite the Executive's broad claim that they were. *Id.* The Court granted certiorari before judgment in view of the public importance of the matter. *Id.* at 49. *See* Lindgren & Marshall, 1986 S. Ct. Rev. at 268-69. As the Court put it later that Term:

> [Certiorari before judgment was granted in *The Three Friends* because] the question involved was one affecting the relations of this country to foreign nations, and therefore one whose prompt decision by this court was of importance, not merely for the guidance of the Executive Department of Government but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

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[9] For example, on January 9, 2006, the Chancellor of Germany, an ally of the United States, publicly called for the closure of the Guantánamo Prison. *See Guantanamo Mustn't Exist in Long Term*, Der Spiegel, January 9, 2006; http://www.bbc.co.uk.

Forsyth v. City of Hammond, 166 U.S. 506, 514 (1897). *See also United States v. Nixon*, 417 U.S. at 686-87, 690 (granting certiorari before judgment in a case involving the reach of the Executive power because of the "public importance of the issues presented and the need for prompt resolution"); *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy"); Lindgren & Marshall, 1986 S. Ct. Rev. at 292-93 ("Effective foreign policy . . . requires consistent signals.").

Without certiorari before judgment, resolution of the question presented herein likely would be delayed for at least a fifth year. The Executive has made plain its determination to resist to the last extreme every adverse ruling in the Guantánamo cases; indeed, every effort by coordinate branches of government to constrain its actions.[10] The party disappointed in the court of appeals surely will seek certiorari here. That procedural delay will not only would add to the substantive harm suffered by these innocent Petitioners now imprisoned at Guantánamo, it will cast a significant cloud over the Executive's compliance with its domestic and international obligations and promote continuing uncertainty as to the judicial power in other cases.

If this case involved simply an erroneous ruling by a district court, the Petitioners would not be seeking the Court's intervention now. But this particular error empties *Rasul* and *Hamdi* of meaning for every current or future alien prisoner of

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[10] On December 30, 2005, the President signed legislation banning torture, but announced himself unconstrained by the legislation in the exercise of his war powers. Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 Weekly Comp. Pres. Doc. 1918 (Dec. 30, 2005).

the Executive, in an age of unprecedented assertion and exercise of Executive power. If a district court lacks the power even to parole human beings whom the court has determined are being held without any legal basis, then there is no set of facts in the hundreds of pending cases -- or, indeed, in future cases involving Guantánamo or other Executive prisons in other places -- in which any meaningful judicial action can be taken.

When this Court remanded *Rasul* to a district judge to "consider in the first instance the merits" of a Guantánamo *habeas* petition, *see* 542 U.S. at 485, it did not envision an academic exercise. If the Court believed, as the district court ruled in the decision below, that "a federal court has no relief to offer," it would have affirmed, rather than reversed, the decision of the court of appeals that the petition should be dismissed.

On rare occasions, the structural importance of a constitutional issue requires this Court's intervention before judgment. The twin legal propositions challenged in this case -- that imprisonment may be at the Executive's pleasure, and that the judicial branch is impotent -- present such an issue here. In *Hamdi*, this Court said that "[the writ of *habeas corpus*] ensur[es] that [the Executive] does not detain individuals except in accordance with law." 542 U.S. at 525. That statement was true then. It is not true today. For that reason, certiorari before judgment is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari before judgment.

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED DECEMBER 22, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-0497 (JR)

ABU BAKKER QASSIM, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

MEMORANDUM

Abu Bakker Qassim and A'del Abdu Al-Hakim are Muslim Uighurs, natives of China's western semi-autonomous Xinjiang province. They were captured by Pakistani security forces in late 2001 or early 2002, delivered into U.S. custody, and held in Afghanistan for approximately six months. In June 2002 they were transferred to the naval base at Guantanamo Bay, Cuba, where they were detained as "enemy combatants," and where they remain to this day, even though as much as nine months ago[1] a Combatant Status

1. The record does not reflect the date of the CRST determination.

Review Tribunal (CSRT) determined that "they should no longer be classified as enemy combatants." Resp't Mem. in Opp'n to Mot. to Vacate Stay Order at 4, n.5.

Qassim and Al-Hakim petitioned for a writ of habeas corpus on March 10, 2005. The government (which knew about the CSRT determination but advised nobody) moved for a stay of proceedings pending the Court of Appeals' decision in the consolidated appeals of *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), and *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d. 443 (D.D.C. 2005). Petitioners (whose counsel were ignorant of the CSRT determination) moved for a preliminary injunction. On April 13, 2005, I (also ignorant of the CSRT determination) denied the motion for preliminary injunction and granted a stay of all proceedings concerning these petitioners, including "their release, repatriation, or rendition."[2]

In the midst of this motions practice, counsel for petitioners twice sought information from the government about proceedings before the CSRT, *see* Manning Decl., Exs. G-H. The government did not respond.[3] It was only in mid-

2. Both sides have appealed that stay order, but the parties agree that the pendency of their appeals does not oust this Court of jurisdiction to decide the matters presented by petitioners' instant motions.

3. At a hearing held on August 1, 2005, the government acknowledged receiving informal discovery requests for the 120 detainee cases it has, and stated that it generally did not respond to such requests "simply because we're not in a position to do it, especially when these cases should be stayed because the legal issues involved are before the Court of Appeals." August 1, 2005 Tr. at 16.

July, when petitioners' counsel traveled to Guantanamo Bay to meet their clients for the first time, that counsel were informed by their clients that the CSRT had found them not to be enemy combatants. After this information was confirmed by a JAG officer stationed at Guantanamo Bay, Willett Decl. ¶ 15, counsel filed an emergency motion to vacate the stay order and for their clients' immediate release. The government opposed, and a hearing was held on August 1, 2005.

The status of "enemy combatant" has been, until now, the only handhold for the government's claim of executive authority to hold detainees at Guantanamo. It is the only rationale approved by the Supreme Court, *see Hamdi v. Rumsfeld,* 124 S.Ct. 2633, 2639-40 (2004). Now that these petitioners are classified as "no longer enemy combatants" (NLECs), the government has had to articulate a new reason for continuing to hold them. That reason, asserted at the August 1 hearing, again in the government's post-hearing memorandum, and yet again in open court on December 12, 2005, is "the Executive's necessary power to wind up wartime detentions in an orderly fashion." Resp't Supplemental Mem. at 12.

On August 19, 2005, I issued a memorandum order stating, "It is not necessary to decide whether such a 'wind up' power really exists . . . , because the parties agree that Qassim and Al-Hakim should be and will be released." In light of this agreement, and the government's assurance that diplomatic efforts were being made to find a country that would accept the petitioners, I withheld decision on the motion to vacate.

Appendix A

Four months have passed since that order, and four years have passed since the petitioners were locked up. At the December 12 hearing the government asserted that progress is being made on the diplomatic front but declined to elaborate except *in camera*. I declined to receive secret information on that subject—information that could have been offered only to coopt the court and seek further delay. Petitioners now urge that action be taken promptly—immediately, in fact, because petitioners fear that Congress is about to enact legislation that will strip the federal courts of habeas jurisdiction over Guantanamo detainees. I announced on December 12 that I would rule within two weeks, so that, whichever way the ruling went, the case might at least be put into an appealable posture.

The case presents two fundamental questions: Does the government have "wind up" authority indefinitely to detain non-U.S. citizens at Guantanamo Bay, if they are not enemy combatants? If not, does a district court have the authority to fashion an effective remedy for the illegal detention?

Legality of petitioner's indefinite detention

The government claims that it has authority for petitioners' continued detention because the Executive has the "necessary power to wind up wartime detentions in an orderly fashion." Resp't Supplemental Mem. at 12. A major premise of that claim, of course, is that petitioners' detention was lawful in the first place. *Hamdi* did confirm the proposition that the Executive has power to wage war and detain suspected enemy combatants, that is, persons alleged to be "'part of or supporting forces hostile to the United States

or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 542 U.S. at 516 (quoting the government's proffered definition of enemy combatant), but the government has not stated that these petitioners were ever suspected of having engaged in armed conflict against the United States. What we know of them is only that they were captured as they fled towards Pakistan after the inception of coalition bombing. *See* Hood Decl. ¶ 2. The government's use of the Kafka-esque term "no longer enemy combatants" deliberately begs the question of whether these petitioners ever were enemy combatants.

The support the government offers for its assertion of "wind up" authority is unpersuasive and, in my view, actually cuts against the government's position. As the Supreme Court noted in *Hamdi,* the authority to detain in wartime is grounded in the need to prevent captured individuals from returning to the field of battle. 542 U.S. at 518-21; *see also* Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war") (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)). Because of this limited purpose, the laws of war require that detention last no longer than the active hostilities. *Hamdi,* 542 U.S. at 521 (citing Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities")). Nothing in this record establishes that the

government has or could reasonably have a concern that these petitioners would return to the battlefield if released.

Even if petitioners' initial detention was lawful, however, and even assuming that some reasonable wind up period of detention was allowable, their continued detention for nine months after the CSRT found them to be NLEC's far exceeds the presumptive limit of six months the Supreme Court applied in the analogous context of removable and excludable aliens detained under immigration statutes. *See Zadvydas v. Davis,* 533 U.S. 678 (2001) (presumptive limit to reasonable duration of post-removal-period detention under INA for removable alien is six months); *Clark v. Martinez,* 543 U.S. 371 (2005) (six-month presumptive limit to detention applies to inadmissible aliens). The detention of these petitioners has by now become indefinite. This indefinite imprisonment at Guantanamo Bay is unlawful.

Availability of an effective remedy

Ordinarily, a district judge reviewing a habeas petition does not need to proceed very far beyond determining that the detention is unlawful before ordering petitioner's release. The ordinary case, however, does not involve (I) aliens (ii) held outside the geographic territory of the United States (though not outside its "complete jurisdiction and control," *see Rasul v. Bush,* 542 US 466 (2004)) (iii) in a camp inside a secure military facility. The habeas statute requires a court after determining the facts to "dispose of the matter as law and justice require," 28 U.S.C. § 2243. The question in this case is whether the law gives me the power to do what I believe justice requires. The answer, I believe, is no.

Appendix A

Until a few days ago, petitioners were urging me to invoke the plain language of the habeas statute and order the government to "produce . . . the bod[ies]" of the petitioners at a hearing to be held in this court. At such a hearing, they argued, I would evaluate the government's security concerns and then set appropriate conditions for petitioners' release into the community, on parole, until the government could arrange for their transfer to another country. *See, e.g., Baker v. Sard,* 420 F.2d 1342, 1343 (D.C. Cir. 1969) (district court has "an inherent power to grant relief *pendente lite,* to grant bail or release pending determination of the merits"); *Mapp v. Reno,* 241 F.3d 221, 226 (2d Cir. 2001) (citing *Baker v. Sard* in alien case).

The government's first objection to this suggestion, invoking the doctrine of consular non-reviewability, *see, e.g., City of New York v. Baker,* 878 F.2d 507, 512 (D.C. Cir. 1989), is wide of the mark. These petitioners are not applying for visas, and there has been no exclusion or removal order. If genuine issues of material fact existed with regard to the legality of petitioners' detention, I believe the language of the habeas statute and the authority of *Rasul v. Bush* would trump decisions like *Baker* and support an order to produce the bodies of the petitioners here. (Note that the Supreme Court issued its decision in *Rasul* over the dissent's reminder of "the dire warning of a more circumspect Court" in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), of the burdens and even dangers of such a ruling. 542 U.S. at 499.) Here, however, there is no need for a hearing to resolve factual issues relating to the legality of petitioners' detention, for the government concedes that petitioners are NLECs. The command of the habeas statute is qualified. It requires the court to order the

body of the petitioner produced "[u]nless the application for the writ and the return present only issues of law." 28 U.S.C. § 2243. Only issues of law are presented here, and there is no requirement to produce the body.

Petitioners' alternative suggestion that I order them released into the general population of the base at Guantanamo Bay was summarily rejected by my order of August 19, 2005. Such an order would raise serious constitutional problems without significantly improving petitioners' situation. Guantanamo Bay is a secure military installation under the command of military officers whose mission is an ongoing part of the President's duties as commander in chief. Petitioners cite no authority for the proposition that I can order the military to allow a civilian, much less a foreign national, access to a military base, and of course I cannot. "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy,* 367 U.S. 886, 890 (1961). Accordingly, a commander may, "in his discretion, exclude private persons and property . . . or admit them under such restrictions as he may prescribe in the interest of good order and military discipline." *Id.* at 893 (internal quotation marks and citations omitted).

At the December 12 hearing I postulated another alternative, as a sort of thought experiment: a simple order requiring the petitioners' release, without specifying how, or to where. After thinking about it for a few days, the petitioners embraced the idea (Memorandum of 12/16/05, Dkt. # 56). The experiment cannot work, however.

"[H]abeas corpus is at its core, an equitable remedy." *Schlup v. Delo,* 513 U.S. 298, 319. Judges have "broad discretion" to fashion an appropriate remedy. It may extend beyond simply ordering the release of a petitioner, *Carafas v. LaVallee,* 391 U.S. 234 (1968), and is to "be administered with the initiative and flexibility essential to insure that miscarriages of justices within its reach are surfaced and corrected." *Harris v. Nelson,* 394 U.S. 286, 291. Habeas corpus "never has been a static, narrow, formalistic remedy; its scope has been to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham,* 371 U.S. 236, 243 (1963). At its historical core, habeas corpus "has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *Rasul,* 542 U.S. at 474 (citations omitted). The Supreme Court has noted its "scope and flexibility—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes." *Harris,* 394 U.S. at 291.

To order these petitioners released, however, would require cutting through more than "barriers of form and procedural mazes." The obstacles are constitutional and involve the separation of powers doctrine. It appears to be undisputed that the government cannot find, or has yet not found, another country that will accept the petitioners. Thus, the only way to comply with a release order would be to grant the petitioners entry into the United States. Although, as noted above, the immigration/alien exclusion cases are not strictly applicable, a strong and consistent current runs through them that respects and defers to the special province

of the political branches, particularly the Executive, with regard to the admission or removal of aliens. Long after the Chinese exclusion cases, *Fok Yung Yo v. United States*, 185 U.S. 296, 305 (1903); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893), it was settled law that the power to exclude aliens "is inherent in the executive power to control the foreign affairs of this nation," *Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950), and that "the conditions of entry for every alien . . . have been recognized as matters . . . wholly outside the power of [courts] to control." *Fiallo v. Bell*, 430 U.S. 787, 796 (1977).

These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. China is keenly interested in their return. An order requiring their release into the United States—even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted"—would have national security and diplomatic implications beyond the competence or the authority of this Court.[4]

Conclusion

In *Rasul v. Bush*, the Supreme Court confirmed the jurisdiction of the federal courts "to determine the legality of the Executive's potentially indefinite detention of

4. I reject the government's argument that Congress' enactment of the Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005) ("Real ID Act"), operates to repeal or override whatever powers the habeas statute may confer in this case. Congress amended the INA to exclude district court jurisdiction over *immigration* decisions. Real ID Act § 106(a).

individuals who claim to be wholly innocent of wrongdoing." 542 U.S. at 485. It did not decide what *relief* might be available to Guantanamo detainees by way of habeas corpus, nor, obviously, did it decide what relief might be available to detainees who have been declared "no longer enemy combatants." Now facing that question, I find that a federal court has no relief to offer.

An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

Appendix A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-0497 (JR)

ABU BAKKER QUASSIM, *et al.*,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

ORDER

For the reasons stated in the accompanying memorandum, Petitioners' motion to vacate the stay order is **granted** in part and denied in part, and petitioners' petition for a writ of habeas corpus is **denied**. This is a final, appealable order.

JAMES ROBERTSON
United States District Judge

Supreme Court, U.S.
FILED
MAR 23 2006
OFFICE OF THE CLERK

No. 05-892

In the Supreme Court of the United States

ABU BAKKER QASSIM, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Detainee Treatment Act of 2005 divests the courts of jurisdiction over this case.

2. Whether the district court properly held that the military was not required to release petitioners upon its determination that they should no longer be detained as enemy combatants, where petitioners object to being returned to their native country and have no immigration status or other right permitting them to enter the United States, and where the Executive is actively seeking to find another country that will accept them.

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In the Supreme Court of the United States

No. 05-892

ABU BAKKER QASSIM, ET AL., PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a-11a) is reported at 407 F. Supp. 2d 198. The case is currently pending before the court of appeals, and, hence, there is no opinion of the court of appeals at this time.

JURISDICTION

The order of the district court (Pet. App. 12a) was entered on December 22, 2005. The notice of appeal was filed on December 23, 2005. The petition for a writ of certiorari before judgment was filed on January 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e). The court of appeals, and in turn this Court, lacks jurisdiction because of the Detainee Treatment Act of 2005. See pp. 9-11, *infra*.

STATEMENT

1. On September 11, 2001, the United States endured the most deadly and destructive foreign attack in its history. In response, the President took immediate action to defend the country and prevent additional attacks, and Congress approved his use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

The President ordered United States Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that had harbored it in Afghanistan. Although United States troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat against these enemies remains active and ongoing. Many Americans have been killed or wounded in combat, and many more continue to be in harm's way in order to defeat al Qaeda and the Taliban, and to protect this Nation from further attacks.

As in the case of every other major armed conflict in the Nation's history, in the course of these conflicts, the United States has captured and detained thousands of individuals. Consistent with the law and settled practice of armed conflict, it has detained a small fraction of them as enemy combatants. Approximately 480 of these enemy combatants are being held at the United States Naval Base at Guantanamo Bay, Cuba. Each of them was captured abroad and is an alien.

2. Every Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT). The United States military established those tribunals "to determine, in a fact-

based proceeding, whether the individuals detained * * * at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." Memorandum from Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba 1 (July 29, 2004) (England Memo) <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. Out of the 558 CSRT hearings conducted, 38 resulted in determinations that the detainee in question should no longer be classified as an enemy combatant. See *CSRT Summary* (visited Mar. 17, 2006) <http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf>.

When a detainee is determined to "no longer be classified as an enemy combatant," the Secretary of the Navy advises the "DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with the representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws." England Memo, Enclosure 1, at 9 (CSRT Process). It is, however, the "policy of the United States, consistent with Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, not to repatriate or transfer individuals to other countries where it believes it is more likely than not that they will be tortured." C.A. App. 205.

3. Petitioners are ethnic Uighurs and natives of China. Before September 11, 2001, they received weapons training near Tora Bora, Afghanistan, at a military training facility supplied by the Taliban. C.A. App. 233-234; Pet. App. 1a. After the September 11 attacks on

the United States, Northern Alliance forces approached the military training camp, and petitioners fled with others to the nearby Tora Bora caves. They then fled to Pakistan, where they were captured by Pakistani forces and turned over to the United States military. Pet. App. 1a; C.A. App. 234.

Petitioners were screened by the Department of Defense (DoD) in Afghanistan, determined to be "enemy combatants," and sent to the U.S. Naval Base in Guantanamo Bay, Cuba. C.A. App. 83, 233-234. There, the United States granted each petitioner a hearing before a CSRT to determine whether the detainee should continue to be held as an enemy combatant. *Id.* at 233. For the purposes of the CSRT proceedings, "enemy combatant" was defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Order Establishing CSRT para. a (DoD July 7, 2004) <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. "This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Ibid.* In March 2005, petitioners received CSRT determinations that they should no longer be considered enemy combatants. C.A. App. 233-234; Pet. App. 1a-2a & n.1.[1]

Typically, a CSRT determination that a detainee should no longer be held as an enemy combatant will prompt the detainee's return to his native country. Petitioners vigorously oppose, however, being released to

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[1] Although it will lead to a detainee's release from military custody, a CSRT determination that a detainee should no longer be held as an enemy combatant does not invalidate the military's initial judgment that an individual should be detained as an enemy combatant. See p. 12, *infra*.

their native country.[2] As a result, they are being detained by the military pending the outcome of substantial ongoing diplomatic efforts to transfer them to an appropriate country. Pet. App. 3a. In the meantime, petitioners are housed by DoD at Guantanamo in "Camp Iguana" with other individuals who have received favorable CSRT determinations. In Camp Iguana, petitioners have a communal living arrangement with access to all of the areas of the Camp, including the exercise/recreation yard, their own bunk house, and activity room. Petitioners also have had access to a television set with VCR and DVD capability, a stereo system, recreational items (for activities such as soccer, volleyball, and ping pong), unlimited access to a shower facility, air conditioning in all living areas (which they control), special food items, and library materials. C.A. App. 234-235.

4. Petitioners filed a habeas action in district court demanding their release from detention. On December 22, 2005, the district court denied the habeas petition and entered final judgment. Pet. App. 1a-12a. The court held that the present detention of petitioners, who are no longer classified as enemy combatants, "is unlawful" because, even assuming their initial detention was lawful, their continued detention has "exceed[ed] the presumptive limit of six months the Supreme Court applied in the analogous context of removable and excludable aliens detained under immigration statutes." *Id.* at 6a (citing *Zadvydas* v. *Davis*, 533 U.S. 678 (2001); *Clark* v. *Martinez*, 543 U.S. 371 (2005)). The district court further held, however, that it could not order petitioners' release. *Id.* at 6a-11a.

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[2] As noted above, it is the policy of the United States not to return individuals to countries where it is more likely than not they will be tortured (C.A. App. 205).